

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98B(W)067

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RONALD E. MCCULLEY,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION,
PIKES PEAK COMMUNITY COLLEGE,

Respondent.

This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on August 31, October 20 and November 23, 1998. Respondent was represented by Toni Jo Gray, Assistant Attorney General. Complainant represented himself.

In its case-in-chief, respondent called John Fisher, Investigator; Tamara Beaver, Administrative Program Specialist II; and Richard Allen, Vice-President for Administration, Pikes Peak Community College. Respondent also called four rebuttal witnesses: Eva Reynolds, Purchasing Manager; George Stuart, Director of Public Safety; Laura Genschorck, Administrative Assistant III and Richard Allen, the appointing authority.

Complainant testified in his own behalf and called five other witnesses: John Lonsbury, Director of Facilities and Operations; Robert Laird, employee of Pikes Peak Community College; Shelley Martinez, Accounting Technician; Keith Powell, Utility Worker; and Fred Turner, Supervising Engineer. The proffered testimony of Mike Kelly was excluded for inadequate notice to respondent.

Respondent's Exhibits 1, 2, 3, 5 and 7 were admitted into evidence over objection. Exhibit 4 was admitted without objection, and Exhibit 6 was admitted by stipulation. Respondent offered Complainant's Exhibit C in rebuttal, and it was admitted over objection.

Complainant's Exhibits A through D, L, O and Q were admitted over objection. Exhibit F was admitted without objection. Exhibits I, M, N and R through W were not admitted. Exhibit P was marked for identification but not offered into evidence.

MATTER APPEALED

Complainant appeals a disciplinary termination of December 8, 1997. For the reasons set forth below, respondent's action is rescinded.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether complainant was retaliated against under the Whistleblower Act.

PRELIMINARY MATTERS

At the opening of the hearing on August 31, respondent withdrew its previously filed motion for summary judgment. Complainant moved to compel respondent to produce documents and requested a continuance to review the newly discovered evidence. Respondent opposed both motions, contending that it had produced everything in its possession. Complainant's motions were denied.

Respondent objected to litigating the whistleblower complaint on grounds that it had not been consolidated with the termination case as required by Rule R10-3-4(B). An order of consolidation was then entered pursuant to the rule. A review of the case file indicates that the appeal of the termination and the whistleblower complaint were consolidated in the notice of filing on December 16, 1997.

Respondent's motion to sequester the witnesses was granted, excepting complainant and Richard Allen, respondent's advisory witness.

On October 14, 1998, respondent filed Respondent's Motion for Application of Presumption of Administrative Regularity on grounds that CRE 301 requires the complainant to introduce evidence to rebut the presumption of regularity that attaches to the appointing authority's action. When the hearing reconvened on October 20, the motion was summarily denied.

The identical argument of respondent was rejected in its entirety by the Colorado Court of Appeals in *Herrera, et. al v. Department of Human Services*, No. 97CA1317 (November 5, 1998) (NSOP). The court said:

Initially, we reject PRC's contention that complainants failed to overcome the presumption of administrative regularity applicable to the agency's termination of complainants and that the ALJ erred in not so finding.

In support, PRC relies on CRE 301 and argues that, in response to its 24 exhibits and nearly 200 pages of testimony, complainants offered no exhibits and

only a half-dozen pages of testimony consisting of denials by each complainant.

PRC's reliance on CRE 301 is misplaced. That rule, by its terms, applies in "all civil actions and proceedings not otherwise provided by statute . . ." (emphasis supplied) See also CRE 1101(e).

PRC is a state agency and its personnel actions are governed by statute. See §24-50-101 and 24-50-125, C.R.S. 1998. Consequently, it had the statutory burden to prove, by a preponderance of the evidence, that the acts for which disciplinary action was taken occurred and that just cause existed for complainants' termination. See §24-4-105(7), C.R.S. 1998.

Finally, our supreme court has held that placing the burden of proof on the appointing authority is consistent with a certified state employee's constitutional and statutory right to be discharged only for cause. See Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994) (the appointing authority is the party attempting to overcome the presumption of satisfactory service). Hence, CRE 301 does not apply.

Slip op. at 2-3 (emphasis in original).

Respondent's Motion for Sanctions was filed in the afternoon of the hearing on October 20 while complainant was testifying, arguing that the complainant should be denied the opportunity to introduce any documentary evidence and that complainant's testimony should be limited. The motion was denied.

FINDINGS OF FACT

1. Ronald E. McCulley, complainant, was a certified Utility Worker I with the Facilities and Operations Division of Pikes Peak Community College (PPCC), the respondent, when he was dismissed on December 8, 1997. He had been a permanent classified employee for more than two years, having previously served as a temporary employee of respondent. His duties involved groundskeeping, inclusive of the operation of heavy equipment.

2. McCulley was supervised by Stuart Bourassa. Bourassa supervised a crew of three full-time classified utility workers, work-study students and community service workers.

3. For a number of years, perhaps as many as nine, Bourassa was suspected of using PPCC employees and equipment to perform outside work and pocketing payment for the services, scrapping metal belonging to PPCC and keeping the money, and dealing in drugs. The evidence was not sufficient enough for the appointing authority to take action until McCulley's statements of November 6, 1997.

4. In the morning of November 5, 1997, Bourassa approached McCulley with \$80.00 in

cash (three twenties and two tens) folded in a sheet of notebook paper, which was stapled, and told McCulley that the money was payment for doing a job. McCulley stated that he did not want that money or anything else from Bourassa. Bourassa responded that he would put the money in McCulley's car, which he did. McCulley later found the money in the ashtray of his vehicle. At that time, he took the folded paper and went to the PPCC human resources office and talked to Tamara Beaver, an administrative program specialist. He wanted to file a grievance against Bourassa and he wanted to transfer to another supervisor. He had several complaints against Bourassa, including Bourassa's insistence that McCulley work beyond his physical limitations and that McCulley drive an unsafe dump truck. McCulley told Beaver about the folded piece of paper containing money and said that he did not want it. He asked Beaver to keep it. She told him to hold onto it and to come back the next day to talk to the human resources director. An appointment was set for 9:00 a.m.

5. The next day, November 6, McCulley went to the human resources office and met with the director, Rosin Manzanares, whom he told Bourassa had left the money in his car and he did not want to keep it. Manzanares said she wanted to call in George Stuart, the campus chief of police, which she did. Chief Stuart came in, and they talked about McCulley's allegations. Stuart told McCulley that he needed a written statement. They went to the public safety office, and Officer John Fisher took over. Officer Fisher and McCulley talked for about an hour. McCulley alleged that his supervisor, Bourassa, had directed him to work on an outside job with the use of PPCC equipment and tried to pay him in cash, that Bourassa ordered him to sign in community service workers when they did not work and that Bourassa received cash or narcotics from those workers. McCulley stated that he did not want any money from Bourassa and asked Fisher to take it. Fisher made photocopies of the \$80.00 in cash and gave it back to McCulley.

6. When confronted with the allegations on November 6, Bourassa resigned.

7. On November 10, 1997, Fisher interviewed McCulley again for more details about the events concerning Bourassa. Chief Stuart and John Lonsbury, Director of Facilities and Operations, also participated. Lonsbury offered McCulley a chance to resign or face criminal prosecution for his involvement in Bourassa's activities, the same offer he had made to Bourassa. McCulley refused to resign because he had done nothing except follow the orders of his supervisor.

8. Throughout the November 10 meeting, McCulley professed his innocence of wrongdoing, stating that he only did what his supervisor told him to do. He stated that any checks or money he received were turned over to his supervisor. At the conclusion of the meeting, at the behest of Officer Fisher, McCulley wrote out a statement, which was then typed and provides as follows:

I have one red toolbox given to me by Stuart Bourassa. I also have a swamp cooler given to me by Stuart Bourassa. I also have one fold up table that I got out of the trash can and repaired. I have at no time taken gasoline for my vehicle that I did not replace that same day. I also hauled a Mazda pickup truck that was scrap, scrap metal, computer CPUs, to the scrapyards (sic) from my boss Stuart Bourassa to which they wrote me a check that I gave to Stuart Bourassa. I have also taken scrap

aluminum and metal to Western Scrap on orders from Stuart Bourassa. When checks were made out in my name I gave the checks or cash to Stuart Bourassa. I believed this was okay to do as my boss (Stuart Bourassa) had been doing it for a long time and told me it was okay. Also I signed Community Service workers in on Saturdays for my boss (Stuart Bourassa) when he would call or ask me to do so. He would give me their names. All this information is to the best of my memory.

(Respondent's Exhibit 5, p. 5 and p. 28.)

9. As the Director of Facilities and Operations, John Lonsbury was required to approve the rental, sale, trade or scrapping of all PPCC property. (Exhibit L.)

10. Bourassa's immediate supervisor was Lonsbury. Approximately in the summer of 1996, Bourassa asked Lonsbury what to do with the scrap metal, and Lonsbury replied: "Get rid of it; I don't care what you do with it."

11. Bourassa sold PPCC property and pocketed the money from the sales. He bragged about it, referring to Lonsbury's words that he did not care what they did with the scrap metal. Bourassa had sold college scrap metal for his personal profit since before McCulley was employed.

12. Bourassa was verbally abusive to all of his subordinates, including McCulley. He threatened them with their jobs if they did not do what he said. He was known to lose his temper and once threw his radio across the room. In a rage, Bourassa screamed "Fuck you" at McCulley. More than once he threatened McCulley with the loss of his job or a promotion. McCulley feared him and requested a transfer to another supervisor. The transfer request was denied by Lonsbury.

13. On a Saturday in 1997, Bourassa telephoned McCulley at work and told him that a particular community service worker had worked the Saturday before and to log him in. McCulley followed his supervisor's instructions. This was the only time that he wrote in a community service worker.

14. On November 14, 1997, Richard Allen, Vice-President for Administration and the appointing authority in this matter, upon the recommendation of John Lonsbury, scheduled a predisciplinary meeting with McCulley "to discuss allegations that you sold PPCC property to a scrap company on numerous occasions and received checks made out to you personally." (Exhibit 2, Exhibit 1.)

15. The R8-3-3 meeting was held on November 19, 1997. The meeting was attended by McCulley, Allen, Rosin Manzanares and Pam Archuletta, Student Services Specialist. There were no allegations as such against McCulley, but rather the meeting was based on the allegations McCulley had made against Bourassa. McCulley's position continued to be that whatever he did was done in carrying out the orders of his supervisor and that he did not personally benefit. Allen admitted that Bourassa may have been selling scrap for five years before McCulley arrived, but he did not feel that following orders was an excuse for McCulley's conduct.

16. A second predisciplinary meeting, again upon the recommendation of Lonsbury, was held on December 3, 1997 “to discuss information concerning allegations that on numerous occasions you recorded that community workers worked hours, which in fact, they had not.” (Exhibit 3, Exhibit 1.) There were no specific allegations against McCulley, who declined to provide information.

17. Allen made the decision to terminate McCulley’s employment the day following the second R8-3-3 meeting. He did not review McCulley’s personnel records or evaluations because he believed them to be irrelevant.

18. There were no allegations that McCulley used drugs, and questions concerning drug use by employees were not a factor in Allen’s decision.

19. Bourassa’s use of PPCC equipment and employees for work off campus was not a factor in Allen’s decision.

20. In an undated letter, the appointing authority dismissed McCulley for “failure to comply with the standards of efficient service or competence and willful misconduct” effective December 8, 1997. (Exhibit 1.)

21. Complainant filed a timely appeal on December 11, 1997.

DISCUSSION

I. Introduction

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

The State Personnel Board may reverse or modify respondent’s action only if such action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. In determining whether an administrative agency’s decision is arbitrary or capricious, the administrative law judge must determine whether a reasonable person, considering all the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. *Ramseyer v. Colorado Department of Social Services*, 895 P.2d 506 (Colo. App. 1992).

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept parts of a witness’s testimony and reject other parts. *United States v. Cueto*, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part or none of a witness’s testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995).

It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995). The preponderance of the evidence standard, as used in this administrative proceeding, requires the fact finder to be convinced that the factual conclusion he chooses is more likely than not. Koch, *Administrative Law and Practice*, Vol. I at 491 (1985).

II. Respondent's Case

Respondent argues that complainant is not a whistleblower and was not dismissed for disclosures.

The "Whistleblower Act," found at §§ 24-50-101, *et. seq.* C.R.S., prohibits an appointing authority or supervisor from taking disciplinary action against an employee in retaliation for the employee's disclosure of information. In order to enjoy the protections of the act, employees must make a good faith effort to provide the information to their supervisor, appointing authority or member of the general assembly prior to disclosure.

Complainant did not actually make any public disclosures. His accusations against Bourassa did not surface until November 1997 and stayed within the agency. The evidence is insufficient to support a finding that he was dismissed after threatening to make a disclosure. Complainant did not argue at hearing that the Whistleblower Act applied, and it is clear from the evidence that his conduct does not fall within the purview of the statute. Respondent put forth a business reason for the discharge, that is, involvement in illegal activity, and complainant was unable to show that he was dismissed for the disclosure of information. He did, however, make a general retaliation argument, which is addressed below.

Respondent contends that Stuart Bourassa's conduct does not excuse complainant from his own actions of theft of money and time. But while respondent built a strong case against Bourassa, evidence of complainant's like conduct was virtually nonexistent. Theft of what money? What time?

Respondent also argues that the fact that a \$2,000 boiler system was missing is evidence of complainant's guilt. Though there was testimony of a missing boiler system, the testimony implicated Bourassa and exonerated complainant. Not one witness suggested that complainant stole the missing boiler. Nor did any witnesses implicate complainant in the improper usage or PPCC equipment off campus or in drug activity, despite extensive testimony in those areas.

Respondent argues that Lonsbury's statement in 1996 to the effect that he did not care what was done with the scrap, if the statement was made, does not excuse conduct that took place nine years ago, with an apparent reference to Bourassa. Whatever Bourassa did nine years ago is not at issue here, since complainant was not employed by the agency for most of that time.

According to the termination letter (Exhibit 1), McCulley was dismissed for two reasons, the first being:

The purpose of the first meeting was to discuss information concerning allegations that you sold PPCC property to a scrap company on numerous occasions and received checks made out to you personally. During the meeting you were given the opportunity to provide me with an explanation or mitigating information to discuss before considering discipline. You repeatedly stated that you were following the directions of your supervisor, Stuart Bourassa. This does not mitigate your actions.

First, there were no “allegations” against McCulley, only his own statements made in connection with his accusations of wrongdoing on the part of his supervisor. There was no evidence that complainant benefitted in any way from the scrapping of PPCC property. There was no evidence of specific instances of misconduct by him. The only documentary evidence of complainant’s involvement is Complainant’s Exhibit O, a copy of a check from a scrap processing company made out to complainant and signed over by him to Bourassa and cashed by Bourassa. Exhibit O serves to corroborate complainant’s consistently told story that he did not personally benefit from the sale of scrap metal. Respondent did not introduce credible contrary evidence. If complainant did not benefit, then why did he do it? The answer is: because his supervisor told him to do so.

The appointing authority did not even consider the possibility that complainant’s reliance on orders from his supervisor might mitigate his conduct. Yet, there was credible testimony that Bourassa sold scrap metal under the guise that the sale of scrap was permissible, and even that his supervisor approved of it. Additionally, credible testimony established that Bourassa threatened his subordinates with adverse consequences if they did not do what he said, and that complainant feared him. In this scenario, complainant’s conduct was mitigated.

The appointing authority testified that he did not review complainant’s personnel file because he believed complainant’s past performance to be irrelevant. This, in itself, is arbitrary, capricious and contrary to rule. Past performance is relevant. The evidence supports the conclusion that the appointing authority terminated complainant’s employment in disregard of the factors governing the decision to correct or discipline an employee found in Rule R8-3-1, 4 Code Colo. Reg 801-1.

The second reason advanced for complainant’s dismissal was put as follows:

The purpose of the second meeting was to discuss information concerning allegations that on numerous occasions you recorded that community workers worked hours, which in fact, they had not. You offered no explanation or information to refute the allegation. You stated that you chose not to respond to the question. This does not mitigate your actions.

Exhibit 1.

Once again, there were no allegations for complainant to refute. The appointing authority had no independent evidence, only complainant’s statement with respect to Bourassa’s activities.

The evidence at hearing consisted of the testimony of complainant's witness, who was present on a Saturday when Bourassa telephoned and told complainant to log in the name of a community service worker as having worked the previous Saturday. Bourassa's words were characterized as a supervisory order. Complainant testified that this was the only such incident for him, but it was known to be Bourassa's practice. Respondent proffered no evidence whatsoever that would sustain its claim of "allegations that on numerous occasions you recorded that community workers worked hours, which in fact, they had not." The appointing authority admitted on the stand that he had no evidence other than complainant's written, generalized statement, which, on its face and in light of complainant's verbal assertions and testimony, is insufficient to sustain a termination.

No evidence was introduced to show that complainant had an improper motive or that he gained personally by logging in community service workers. He derived no benefits. There were no allegations that he and Bourassa engaged in a conspiracy to commit wrongdoing. The appointing authority did not fairly and open-mindedly consider the issues before concluding that complainant's conduct warranted immediate dismissal.

Thus, respondent may have made a case for an admonition, but it fell far short of carrying its burden to prove just cause for complainant's termination of employment.

III. Affirmative Defenses

Complainant submits that he was fired for what he knows. Specifically, he argues that his dismissal was pure retaliation from John Lonsbury for information provided about Lonsbury's main employee, Stuart Bourassa. No inappropriate connection was drawn between Lonsbury and the appointing authority who rendered the final decision. Bourassa was not given any breaks. Lonsbury, himself, was investigated for wrongdoing and was exonerated. Complainant did not proffer sufficient evidence to prove that his termination was the result of retaliation. In fact, he offered little more than his slanted perspective. On this record, it cannot be found that complainant was dismissed as an act of retaliation.

Complainant contends that he was falsely imprisoned at the meeting of November 11, was not free to leave and his statements were coerced. Based on the evidence as presented, it cannot be concluded that complainant's perspective in this regard accurately reflects reality.

IV. Relief

Complainant testified on cross-examination that he has filed two worker's compensation claims, that he is not presently released by his physician to go to work and that he would need further job modifications or a similar job that he could do physically. There the evidence ends. Respondent did not assert that complainant's physical condition should have a bearing on the

requested relief. There is no further evidence of whether complainant has become disabled or the time frame in which the disability, if any, occurred, or the nature thereof. There is little evidence of the functions of the job. The record is inadequate to support the necessary determinations. Therefore, the reinstatement order herein presumes that complainant will be reinstated to his former position under the working conditions that existed at the time of his dismissal. The parties are charged with the responsibility of resolving any outstanding issues with respect to the implementation of this order.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious and contrary to rule or law.
2. Complainant was not retaliated against under the Whistleblower Act.

ORDER

Respondent's action of terminating complainant's employment is rescinded. Complainant shall be reinstated to his former position with back pay and benefits.

DATED this 4th day of
January, 1999, at
Denver, Colorado .

Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R10-10-1 et seq., 4 Code Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record must make arrangements with a disinterested recognized transcriber to prepare the transcript. The party should advise the transcriber to contact the Board office to obtain the hearing tapes. In order to be certified as part of the record on appeal the original transcript must be submitted to the Board within 45 days of the date of the notice of appeal is filed. It is the responsibility of the party requesting a transcript to ensure that any transcript is timely filed. If you have any questions or desire any further information contact the State Personnel Board office at 303 - 866-3244.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code Colo. Reg. 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code Colo. Reg. 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after

receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of January, 1999, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Ronald E. McCulley
#13 Sunnyland Loop
Fountain, CO 80817

and in the interagency mail, addressed as follows:

Toni Jo Gray
Assistant Attorney General
State Services Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203
